Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

ASHLEY CREEK PHOSPHATE CO.
&
STATE OF UTAH

Petitioners,

v.

CHEVRON USA, INC. et al.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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36 pp

QUESTIONS PRESENTED

1. May antitrust defendants who refused to publish a just and reasonable tariff for a common carrier pipeline essential to competitors' entry into business, assert as a defense that plaintiff lacks standing to claim injury to business under Section 4 of the Clayton Act because, without such a tariff, plaintiff could not complete preparations to enter?

2. Does it constitute "injury to property" for purposes of Section 4 of the Clayton Act, to deprive a competitor of the commercial use of its real property, by charging, for use of the competitor's established right of access to such property through an essential common carrier pipeline, only rates found illegal under the Interstate Commerce Act ("ICA") by the Interstate Commerce Commission/Surface Transportation Board ("ICC/STB") because they exceed the highest price competition would allow?

3. Does it defeat standing to sue for such injury that such interference with property rights occurs prior to the ripening into a "business" of on-going efforts to develop the realty, so as to also sustain an "injury to business" under Section 4?

4. Does the holding of the Tenth Circuit Court of Appeals that no claim of antitrust injury to commercial real estate will lie which does not also qualify as a claim of injury to a business exploiting such realty, conflict with the Supreme Court's ruling in Reiter v. Sonotone Corp., 442 U.S. 330 (1979)?

5. Where, upon referral from the District Court, the ICC/STB determines that defendants published for an essential common carrier pipeline, at all times pertinent to the Complaint, only illegal rates in excess of what competition would allow, may the District Court ignore or set aside the agency's ruling on the basis of modification of the tariff long after the ruling?

6. Does the failure of the Court of Appeals to reverse such a ruling by the District Court and to enforce according to their terms Decisions of the ICC and STB in this matter, conflict with the Supreme Court's rulings in Great Northern Ry. v. Merchants Elevator Co., 259 U.S. 285 (1932); Georgia Pub. Serv. Comm'n v. United States, 283 U.S. 765 (1930); United States v. New River Co., 265 U.S. 533 (1923)?

7. Where plaintiff had successfully taken all steps then reasonable or appropriate to take to commence development of its property, on the date defendant illegally refused to publish a tariff for a common carrier pipeline essential to such development, may the District Court treat failure thereafter to take further steps necessary to commence development as undisputed evidence of lack of intent or inability to enter, and decline to submit to the jury evidence that, given a legal tariff, plaintiff could and would have developed the property?

8. Where the defendants thereafter publish only illegal, anti-competitive rates for the essential pipeline, may the District Court treat failure to resume preparations to enter as undisputed evidence of lack of intent or inability to enter, and decline to submit to the jury evidence that,

given a legal tariff, plaintiff could and would have developed the property?

9. Where withholding of an essential facility is shown, should inquiry whether plaintiff was "injured in his business" under Section 4 of the Clayton Act by being kept out of business, shift from whether plaintiff thereafter completed sufficient "preparations to enter" prior to filing suit, to whether plaintiff then had appropriate wherewithal to enter and would otherwise have done so successfully?

10. Does the Tenth Circuit Court of Appeals' ruling to the contrary conflict with rulings of other court of appeals?

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, the parties are:

PETITIONERS: The State of Utah and Ashley Creek Phosphate Co., a nongovernmental corporate party to the proceedings before the United States District Court, District of Utah, and the United States Court of Appeals for the Tenth Circuit. Ashley Creek Phosphate Co. discloses that it is a Utah corporation, without parent corporations, and that no publicly held company owns more than ten percent (10%) of Ashley Creek Phosphate Co.'s stock.

RESPONDENTS: "Chevron" herein refers to one or more of defendants and appellees Chevron Corporation, Chevron U.S.A. Inc., Chevron Chemical Company, Chevron Pipe Line Company, and Chevron Industries, Inc. Chevron U.S.A. Inc., Chevron Pipe Line Company, and Chevron Industries, Inc. are wholly owned by Chevron Corporation. Chevron Chemical Company is a division of Chevron U.S.A. Inc. No corporation owns 10% or more of Chevron Corporation.

J.R. Simplot Company has no parent corporations and no publicly held company owns 10% of its stock. Farmland Industries, Inc. has no parent corporations and no publicly held company owns 10% of its stock. SF Pipeline Limited Company, a limited liability company has a parent company, SF Phosphates Limited Company, a limited liability company. No publicly held company owns more than ten percent 10% of SF Pipeline. SF Phosphates' and FS, Inc.'s parent companies are Simplot

and Farmland. No publicly held company, except Farmland, owns more than 10% of SF Phosphates or FS, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO
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ASHLEY CREEK PHOSPHATE CO., Petitioner, by undersigned counsel, under appropriate rules of this Court, requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the District Court, District of Utah, in this matter appears at 129 F.Supp.2d 1299 (2000).

The opinion of the Tenth Circuit Court of Appeals herein appears at 315 F.3d 1245 (2003).

A preliminary ruling of the Interstate Commerce Commission appears in Ashley Creek Phosphate Co. v. Chevron Pipe Line Co., 5 I.C.C.2d 303 (1989).

A ruling of the Surface Transportation Board, upon referral from the District Court, appears in Ashley Creek Phosphate Co. v. Chevron Pipe Line Co., Nos. 40131, 40810, 1996 WL 625471 (S.T.B. 1996).

JURISDICTION

The Decision of the Court of Appeals was filed January 2, 2003. A Petition for Rehearing was denied January 22,2003. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. Section 15(a), provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any District Court of the United States . . . without respect to the amount in controversy. . . .

STATEMENT OF THE CASE

The parties control, by ownership or lease, what has been called in this matter the "Vernal phosphate field" in northeast Utah. The Vernal field is remote from rail transport essential to phosphate development in the west, which historically limited its development.

Petitioner Ashley Creek Phosphate Company ("ACP") leases from the State of Utah the part of the field not owned by defendants. Plaintiff's portion is State School Trust Lands, acquired by lieu selection from the United States for phosphate development. As a result, it includes a right of ingress and egress over surrounding federal lands for such development. Utah v. Andrus, 486 F.Supp. 995 (D. Utah 1979).

Defendant Chevron is the SF Defendants' predecessor in interest. To enable development of its part of the Vernal field, Chevron in 1984 sought a right-of-way over federal land between Vernal and the railhead at Rock Springs, Wyoming, for a phosphate slurry pipeline. In discharge of its obligation to provide access over federal lands for the State's lands, the BLM required that the Chevron pipeline be a common carrier, providing capacity and regulated rates for shipments by ACP. Otherwise, the BLM refused ACP a further right-of-way, or direct participation in the Chevron line. Chevron represented that the pipeline would be a common carrier under the Interstate Commerce Act ("ICA") in any case.

Chevron constructed a mine and beneficiating plant at Vernal, and a phosphate fertilizer plant at Rock Springs, connected with the phosphate slurry pipeline by 1986. Ashley Creek, following the commitment to common carriage, also commenced development of its property. By 1986, Ashley had explored and tested its properties, demonstrating their suitability, preliminarily designed a mine and processing plant, and performed a preliminary feasibility study showing profitability of an operation selling phosphate concentrate through the Rock Springs railhead to fertilizer plants competing with the new Chevron plant in the "Western market" for phosphate fertilizer.

As of 1986, the parties controlled competing parts of the Vernal phosphate field, and shared access rights in a federal right-of-way connecting the field to a railhead essential to its development. In addition to its right, by virtue of its leases, to the reserves and the access, ACP

was entitled to common carriage under the ICA in the pipeline Chevron controlled in the federal right-of-way.

In 1986, Chevron commenced operation of the pipeline, delivering phosphate concentrate to its plant at Rock Springs and to a Canadian plant, refusing to publish a tariff of reasonable rates for shipments by ACP.

ACP then deferred its preparations to enter competition, and with the State of Utah brought action in the Interstate Commerce Commission ("ICC") to obtain a tariff. In 1989, the ICC ordered publication of a tariff forthwith (the "ICC Decision"). The ICC determined that, upon request in 1986, ACP had a right under the ICA to publication of a "just and reasonable tariff" to provide reliable information with which to plan and to make a decision whether to enter.

In 1989, Chevron published a tariff. The tariff was unreasonable, as subsequently determined by the ICC/STB. In 1989, petitioner and the State of Utah brought an action against Chevron in the District Court under the Sherman and Clayton Antitrust Acts asserting in various counts monopolization by withholding of reasonable access to an essential facility, the pipeline. The Complaint asserts monopolization of production and sales in the Vernal field, of transport in the pipeline, and of production and sale of phosphate fertilizer in the western United States. The issue of the reasonableness of the published rates was then referred to the ICC, and the antitrust action was stayed.

In 1991 and 1992, Chevron published new tariffs. Both have been found unreasonable. In 1992, Chevron

sold its mine-pipeline-fertilizer plant complex to the SF Defendants, which adopted the third tariff. Plaintiff did not re-institute preparations to commence mining following publication of the three tariffs.

The Complaint was amended in 1996 to join the SF Defendants, and to add claims seeking divestiture of an appropriate share of the pipeline to petitioner. Later in 1996, the STB, successor of the ICC, issued a Decision on its referral from the District Court, finding that all three of defendants' tariffs since 1989 had been "unreasonable" at all volumes the parties had claimed would be shipped if plaintiff entered. The ruling was made the law of the case by Judge David Sam.

The SF Defendants asserted that the STB Decision could be read to find only the first two tariffs unreasonable, and it made an agreement with the State not to raise the prevailing tariff. Judge Sam subsequently rejected the claim of authority to so read the STB Decision.

In 1998, the matter was re-assigned to new District Judge Dale A. Kimball. Later in 1998, the Amended Complaint was further amended to add claims that defendants' behavior constituted violation of petitioner's property rights under State law and federal public lands law.

In January 1999, the SF Defendants lowered the prevailing tariff to what they claimed was the minimum. They subsequently filed motions to dismiss and for summary judgment alleging generally that plaintiff lacked standing under Section 4 of the Clayton Act

because its preparations to enter to the date of refusal of a tariff, not resumed following the publication of unreasonable tariffs, were insufficient to constitute a "business" to be injured. They also asserted, upon theories indistinguishable from those previously rejected, that publication of a minimal tariff in 1999 had rendered the first three tariffs reasonable.

The motions were specifically put forward upon the ground that defendants should not have to respond to plaintiff's expert feasibility/damage study scheduled by the court to be submitted shortly, showing when, and in what volume, plaintiff would have commenced profitable shipments of phosphate concentrate if provided a reasonable tariff. The claim was that only "preparations to enter" cotemporaneous with the violations alleged could be considered on the question of existence of a "business" to injure. The District Court announced that it would decide at the time of the hearing whether plaintiff's study was relevant.

The District Court did not dispute that plaintiff successfully took all reasonable and appropriate steps to enter competition to the point of refusal of a tariff, and acknowledged that plaintiff could not have completed a final feasibility study so long as a tariff was withheld. Judge Kimball, however, having previously held that the STB had *not* found the tariffs unreasonable, held that upon publication plaintiff was required to use the tariffs to complete a final feasibility study in order to seek financing. Failure to do so constituted failure to show sufficient "intent and preparedness" to enter business to constitute a business to injure, or a "nexus" of the violation to the injury alleged. The ruling does not

acknowledge existence of the final feasibility study done as trial preparation. In support of the ruling, the District Court held that publication of a cheap tariff in 1999 rendered all prior tariffs "reasonable" retroactively, finally eliminating the STB Decision. The tariffs never having been unreasonable, plaintiff was not excused by any "futility exception" to the "preparation" requirement, from re-instituting "preparations" upon publication of the tariffs. Finally, absent showing of a "business", plaintiff had not shown that its mineral leases could be profitably exploited; thus, it had suffered no cognizable injury to property. The District Court dismissed the complaint.

The Court of Appeals declines to reach, or to correct, the District Court's cancellation of the STB Decision. It then affirms the ruling that plaintiff was required to resume "preparations to enter" by completing a final feasibility study following publication of the tariffs, in order to have had a "business" to injure. While acknowledging that there is a "futility exception" to the rule requiring "intent and preparedness" to enter, the Court of Appeals holds that such an "exception" does not "excuse" "basic preparations" merely because defendants' behavior renders them futile. Finally, the Court of Appeals holds that a claim of interference with rights of access to commercial realty which prevents its development in competition with defendant states no claim of injury to property absent a showing that at the time of such interference plaintiff had in place a "business" of such development.

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS' ELIMINATION OF INJURY TO PROPERTY AS A SEPARATE GROUND FOR STANDING UNDER SECTION 4 OF THE CLAYTON ACT VIOLATES SUPREME COURT PRECEDENT AND DIMINISHES RIGHTS OF PROPERTY.

While Section 4 of the Clayton Act provides plaintiff alternative standing to contest either that his business has been injured "or" that his property has been injured, the Court of Appeals now holds that this comprehends only one kind of injury. That is, while acknowledging that defendants' refusal to publish a tariff in 1986, or publication of illegal tariffs from 1989, for an essential pipeline, states a claim of antitrust violation, the Court of Appeals holds that it was not an "injury" until plaintiff became "prepared to enter business". While this purports to be a rule of "narrow circumstances", the circumstances defined - claims of monetary losses in commerce – would comprehend virtually all claims of injury to property under Section 4. Hawaii v. Standard Oil Co., 405 U.S. 251, 264 (1972). Under the Court of Appeals' view, depriving plaintiff of the use of its property was not an injury to property at all.

In Reiter v. Sonotone Corp., 442 U.S. 330 (1979) the Supreme Court reversed a judgment that "consumers alleging no injury of a commercial or competitive nature are not injured in their property under section 4 of the Clayton Act". Id. At 336-337. The Court of Appeals' ruling directly conflicts with Reiter v. Sonotone Corp..

The word "property" in Section 4 "comprehends anything of material value owned or possessed. . . . Money . . . is a form of property". Id. at 338. The word "or" in Section 4 "makes plain that `business' was not intended to modify `property', nor was `property' intended to modify `business'. Id. at 339.

> . . . the fact that petitioner . . . was deprived of only money, albeit a modest amount, is no reason to conclude that she did not sustain a "property" injury . . . where petitioner alleges a wrongful deprivation of her money . . . she alleged an injury in her "property" under Section 4.

Id. at 340, 342. The Court of Appeals cites no authority that to allege injury due to admitted deprivation of what is concededly property, plaintiff must show the "value" of the property by proving deprivation of more than "a modest amount". Any question of the value of property of which plaintiff is deprived goes only to damage. Waldron v. British Petrol. Co., Inc., 231 F.Supp. 72, 87 (S.D. N.Y. 1964); Jayco Systems, Inc. v. Savin Business Machines Corp., 777 F.2d 306, 314, n. 21, (5 Cir. 1985).

Realty is a form of property. The law presumes that realty, like money, has value. Plaintiff's realty consisted of its mineral leases, including the right to mine and sell the minerals, and an appurtenant right of access to market through the federal right-of-way wholly occupied by the pipeline controlled by defendants, which alone provided access to market. Plaintiff was deprived of its property right of access, and consequently, of its property right to develop and sell its reserves by

defendants' refusal of reasonable pipeline tariffs. This alleges injury to plaintiff's property, notwithstanding the Court of Appeals' sneer that it wasn't much property. It is an injury to property to deprive the owner of its use, by interference with rights of use part of it, notwithstanding he is not deprived of the title.

The District Court's finding, erroneous as a matter of law, that plaintiff's leases only hold value to the extent they could be developed, if correct, would be all the finding of value necessary for standing to claim injury to property. It concedes that the leases have a value which can be realized if plaintiff is permitted to compete.[1]

Whether plaintiff would have successfully realized the monetary value of its property is a question of damages, which does not arise on a motion for summary judgment as to standing. Id. Such a question cannot be disposed of, on summary judgment, by the District Court's conclusion that plaintiff's "preparations" to the date of the violation were not then "business". There was nothing in the evidence below which was *inconsistent* with plaintiff's ultimate success. The preliminary feasibility study to which the court objected was wholly consistent with ultimate success. The proffered study showed contemporaneous market, costs, prices, and

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[1] It could not do otherwise given the voluminous uncontested evidence in this record that the leases hold vast quantities of commercial phosphate ore, which defendants' development of the adjoining, similar property demonstrates can be developed at substantial profit. The Court of Appeals' remark about a "scintilla" of evidence of value is a mistake of fact as well as of law.

profitability. The District Court on this record could not have resolved the issue of "viability" of plaintiff's proposed development.

It is immaterial that defendants did not physically block plaintiff's right of access, or did not reject phosphate concentrate actually tendered for shipment. Defendants'pipeline occupied the one right-of-way which satisfied plaintiff's right of access to market under the ICA and its leases with the State. Defendants charged a monopoly price to exercise plaintiff's right of passage through the federal right-of-way. They gave plaintiff a choice of deprivation of its money, or deprivation of its property rights. No alternative was offered which did not deprive plaintiff of property. They prolonged the deprivation by insisting upon a rate protest proceeding.

The Tenth Circuit's ruling on injury to property is the circularity that so long as defendant prevents plaintiff developing its property, the property has no value; therefore, plaintiff has no standing to complain that defendants prevent plaintiff from developing its property.

It is as illegal under Section 2 of the Sherman Act to keep a competitor out of business as it is to drive a competitor out of business. American Banana Co. v. United Fruit Co., 166 F. 261, 264 (2 Cir. 1908); Denver Petrol. Corp. v. Shell Oil Co., 306 F.Supp. 289, 308 (D.Colo. 1969). The rule underlying the Court of Appeals' application of the "intent and preparation" test is that there can be no "injury" to a non-existing "business". That rule does not reach a claim that diminishment of real property rights which prevents commercial development of the property is an injury to

property. Cf., The Pipeline Cases, 234 U.S. 548 (1913); Woods Exploration and Producing Co. v. ALCOA, 438 F.2d 1286 (5th Cir. 1971) cert. den. 401 U.S. 1047 (1972).

Interference with real property rights, such as deprivation of a right of access for commercial development, which keeps the owner out of the business of using his property for the purposes to which it is adopted, is an injury to property under Section 2 of the Sherman Act and Section 4 of the Clayton Act.

That the interference occurs early in the effort at development, allegedly rendering speculative whether substantial earnings would have been obtained, raises questions of damages, not standing. Waldron, supra; Jayco Systems, supra.

It is not dispositive that those deprived of use of their property have an injunctive action without more. Petitioner brought such an action, first in the ICC, then in the District Court, which deferred to the ICC. In both instances, defendants were legally required, and had opportunity, to voluntarily correct their behavior. They refused and insisted upon ten years of regulatory proceedings. Thereafter, no further injunctive relief was needed, and an action lay for the decade of damages caused by non-compliance with the duty to provide reasonable rates.

The Court of Appeals' ruling permits the owner of part of a commercial mineral field to prevent competitive development of the remainder of the field, by illegal abuse of a jointly held right of access to market. See Pipeline Cases, supra; Woods Exploration, supra; Denver

Petroleum, supra; TCA Building Co. v. Northwestern Resources Co., 861 F.Supp. 1366 (S.D.Tex. 1994). The ruling diminishes the appropriate reach of the antitrust laws, and real property rights wherever they are implicated under the antitrust laws. It adversely impacts the development of public mineral lands throughout the west.

2. THE STB DECISION MAY NOT BE ALTERED OR IGNORED.

The District Court and the Court of Appeals have declined to enforce by their terms determinations by the ICC and STB of matters central to the litigation, in violation of substantial Supreme Court authority.

The STB Decision that all of defendants' tariffs were unreasonable at all relevant shipping volumes was made upon referral from the District Court, upon representation of both parties that the determination would resolve the factual issue whether any access defendants had provided to the essential pipeline had been reasonable. The Decision became the law of the case.

The STB found defendants' rates unreasonable as exceeding the maximum competition would permit. ACP v. Chevron Pipe Line Co., Nos. 40131 (Sub No. 1), 40810 (STB 1996) at 30-31. The ruling, in effect, identifies defendants' rates as monopoly prices for the essential transport.

The ruling that the rates exceeded the maximum amount, including a reasonable profit, reasonably necessary to provide the transport (Id. at 12-14, 30-31),

creates a prima facia case that defendants, shipping on their own line, obtained the transport cheaper than any competitor charged the tariffs. CF Industries Inc. v. Koch Pipeline Co., L.P., STB Docket No. 41685 (May 3, 2000). Such discrimination constituted withholding of reasonable access to the essential pipeline. Aspen Highlands v. Aspen Skiing Corp., 738 F.2d 1509, 1518 (10 Cir. 1984), aff'd 472 U.S. 585 (1985).

The STB Decision builds upon an earlier Decision of the ICC, *res judicata* between the parties, ordering Chevron to publish a "just and reasonable" tariff, because such a tariff was essential to any decision of plaintiff whether to enter business, and to any plan of the timing, size, and type of project to undertake. ACP v. Chevron Pipe Line Co., 5 ICC 2d 303, 310-313 (1989). The ICC prescribed guidelines pursuant to which the tariff was required to provide plaintiff "the best available information for its business planning purposes". Id.

The STB Decision establishes that defendants were in violation of the ICC Decision.

An unreasonable tariff, by definition, exceeds what competition will allow. It is a false statement of competitive transport prices otherwise available in the market. An unreasonable tariff cannot be the basis of an accurate or reliable plan. Assuming other costs and prices are competitive, conclusions about competitiveness, profitability and entry incorporating a tariff competition will reject, must be negative.

Publication of unreasonable tariffs not only withheld the information the ICC had determined was

essential to plaintiff to plan, it deterred preparations to enter by preventing any positive recommendation to seek entry. It withheld reasonable access to the essential facility pipeline as a matter of law. City of Chanute v. Williams Natural Gas Co., 955 F.2d 641, 648-649 (10 Cir. 1992), cert. den. 506 U.S. 831 (1982).

The STB Decision substantiated plaintiff's assertion that publication of unreasonable tariffs, like refusal of a tariff, rendered further preparations futile: the ICC Decision established that, absent a reasonable tariff, further rational preparations were not even possible. To avoid that result, the District Court effectively set the STB Decision aside, holding on an earlier motion that the STB had not found the tariffs unreasonable, then holding that publication of a cheap tariff in 1999 had rendered all tariffs always reasonable. Thus, the District Court treated that publication of the tariffs as fulfilling the ICC's order, and plaintiff was required thereafter to proceed with planning and 'preparations to enter".

The District Court lacked any authority to alter such an agency decision. Its ruling in this regard is in direct conflict with substantial Supreme Court authority.

> . . . it was not within the province of the District Court, in reviewing the determination of the [Interstate Commerce] Commission on the issue, to consider *ab initio* the question whether the application of the tariffs as interpreted by the Commission, would result in unlawful discrimination in violation of Section 2 of the Interstate Commerce Act. . . . The inquiry involves

> the exercise of discretion in a technical field requiring the expertise of the Commission, whether it is conducted to determine if a party in the past has been wronged, a judicial function, or to determine what rate or practice shall be deemed reasonable in the future, a legislative function. Great Northern Ry. V. Merchants Elevator Co., 259 U.S. 285 (1932).

Indiana Harbor Belt Railroad Co. v. United States, 510 F.2d 644, 649 (7 Cir. 1975), cert. den. 422 U.S. 1042 (1975), reh. den. 423 U.S. 884 (1976).

Any question whether the STB Decision had been altered by publication of a subsequent tariff – "what rate or practice shall be deemed reasonable in the future" – was required to be submitted to the STB in the first instance. Great Northern Ry. v. Merchants Elevator Co., supra; Indiana Harbor Belt Railroad Co. v. United States, supra.

The Court of Appeals treats the District Court's ruling on standing as coherent even if defendants' tariffs were unreasonable. If the STB Decision that the tariffs were unreasonable is not eliminated, the Court of Appeals' requirement that plaintiff resume planning following publication of the tariffs eliminates the ICC Decision.

It was not within the province of the Court of Appeals, upon the ground of abjuring to decide whether the District Court's ruling that the tariffs were reasonable was right or wrong, to decline to enforce the STB

Decision that the tariffs were unreasonable, or the ICC Decision that a reasonable tariff was essential to resuming "preparations to enter".

> The Court will not review determinations of the Commission made within the scope of its powers or substitute their judgment for its finding and conclusions.

United States v. New River Co., 265 U.S. 533, 542 (1923).

> It is not our province to inquire into the soundness of the Commission's reasoning, the wisdom of its decision, or the consistency of its conclusions with those reached in similar cases.

Georgia Pub. Serv. Comm'n v. United States, 283 U.S. 765, 775 (1930). There being no power to question the ICC Decision or the STB Decision, there was no power to ignore them.

There is no question that the STB found defendants' tariffs unreasonable at all pertinent times, nor that such a ruling imports that such tariffs discriminate in favor of a carrier-shipper, such as defendants, against competing shippers, such as plaintiff. The STB has so held at the urging of one of the defendants. CF Industries Inc. v. Koch Pipeline Co., L.P., STB Docket No. 41685 (May 3, 2000), at 28-29. Defendants' records show that the discrimination exceeded $4.50/ton of phosphate concentrate sold at destination for $32.50/ton, at all relevant times. There is no question that such

discrimination constitutes withholding of reasonable access to an essential facility. Chanute, supra, 655 F.2d at 648. The ICC plainly held that refusal of a reasonable tariff violated a legal right to information essential to planning for entry.

The District Court's ruling on reasonableness of defendants' rates cannot be left standing as a precedent, because it contradicts the STB and exceeds the court's authority. The Court of Appeals is equally bound by the STB Decision, and thus bound by the prior ICC Decision. Taken together, these decisions establish that defendants, by serial illegal acts, prevented petitioner entering competition by withholding information essential to planning and deciding whether to enter.

3. THE COURT OF APPEALS' REQUIREMENT OF A FEASIBILITY STUDY INCORPORATING ILLEGAL TARIFFS CREATES AN IRRATIONAL AND IMPROPER TEST OF STANDING.

The ICC Decision established that defendants, as pipeline operators, had two distinct legal duties to plaintiff. Beginning in mid-1986, defendants were required to provide pipeline transport when requested at "just and reasonable rates"; they were also required to publish these rates in a tariff as requested, thereby reliably and accurately informing plaintiff of appropriate rates, and subjecting them to regulation.

A "just and reasonable" tariff would inform plaintiff what competitive costs of essential transport it could reliably expect to pay over time. Thus, it could determine what time, if any, it should commence development of its leases in order to have available a

supply of phosphate concentrate at an appropriate price, including pipeline transport, when the market demanded it. When the latter time came, defendants were required to provide the pipeline transport at the "just and reasonable" price.

Had defendants complied with their obligation to inform plaintiff, and had plaintiff prepared to meet the market by constructing mining and beneficiating facilities and entering supply contracts, defendants would have been liable for injury to plaintiff's "business" if they demanded for transport more than the "just and reasonable" rate. That is, defendants concededly would be liable had they complied with their first obligation of accurate information, then failed of their obligation of reasonable transport. They are now held not to be liable because they failed and refused to comply with both obligations.

At the time of the motion below, there was shortly due to be delivered to the District Court on its discovery schedule an expert report showing when plaintiff would have begun making profitable deliveries to customers had defendants provided a "just and reasonable" tariff. The study was delivered on schedule, prior to decision of the motion. It shows that, properly informed by Chevron, plaintiff would have commenced development of its leases to begin profitable deliveries at the latest shortly after the SF Defendants acquired the pipeline. It also shows that at the rates actually charged by defendants, plaintiff would have been well advised not to enter.

The STB Decision in 1996 determined that beginning in 1989, the information defendants provided plaintiff of available pipeline charges was false.

Indulging defendants' claim that their tariffs were proper, plaintiff did the right thing: it correctly concluded that the rates imperiled its profitability and it deferred further efforts to enter. Meanwhile, if it sought transport at proper rates, plaintiff had no option but to pursue a lengthy rate protest proceeding. Defendants refused the opportunity provided to voluntarily correct the tariffs, and the ICC/STB would not set the tariffs aside pending completion of the proceeding. Thus, meanwhile, and for at least two and a half years following the STB Decision, defendants failed in their obligation to provide transport at "just and reasonable" rates.

The Court of Appeals creates for such behavior the defense of lack of standing from the fact that by also failing in its obligation to provide proper information defendants deterred plaintiff from preparing to ship.

The Court of Appeals holds that recognizing standing to sue for being kept out of business in such circumstances, under the "futility exception" to the "intent and preparation" rule, would eliminate any standing requirement. In fact, the "futility exception" simply alters, in order to address the nature of defendants' misbehavior, the proof permissible to establish injury to business. Plaintiff must always show the injury in order to prove damages. It is simply not limited in carrying this burden to proof of "preparations" completed before suit.

It is recognized that enterprises in the planning stage may have standing to sue for damages for injury to business. "Business" as used in Section 4 of the Clayton Act does not mean only on-going businesses, or even businesses fully prepared and at the instant of "entry". ABA Section of Antitrust Law, Antitrust Law Developments 842 & n.38 (5th Ed. 2002) (collecting cases).

As proof of damages requires proof that plaintiff *would* have completed planning, entered successfully and had earnings, this concedes that some proof other than actual completion of preparations and entry must be permissible in all such cases. The "futility exception" merely defines the point at which prospective proof becomes acceptable as that point when defendant's behavior recognizably deters plaintiff making further preparations. Fleer Corp. v. Topps Chewing Gum, Inc., 415 F. Supp. 176, 188 (E.D. Pa. 1976); Hecht v. Pro-Football, Inc., 570 F.2d 982, 988 (D.C.Cir. 1977), cert. den. 436 U.S. 956, 98 S.Ct. 3069, 57 L.Ed.2d 1121 (1978); Huron Valley Hosp., Inc. v. City of Pontiac, 666 F.2d 1029, 1033 (6 Cir. 1981); Jayco Systems, Inc. v. Savin Business Machines Corp., 777 F.2d 306, 315 (5 Cir. 1985); Thompson v. Metropolitan Multi-List, Inc., 934 F.2d 1566, 1572 (11 Cir. 1991).

This does not permit plaintiff to succeed merely by showing, for example, an essential facility violation. Even where such a violation occurred early in plaintiff's preparations, plaintiff would still have to show the availability to it at all pertinent times of appropriate wherewithal to succeed, such as resources, opportunity and market. Further, plaintiff would always have to show

intent. The latter requirement probably could not be fulfilled absent a showing of substantial activity and commitment to enter prior to the violation.

There is no reason that evidence of wherewithal to succeed compiled in preparation for trial necessarily would be more speculative than evidence assembled before suit. In the present case, for example, a feasibility study done as the Court of Appeals requires, incorporating the illegal tariffs, would have produced false and inaccurate conclusions about profitability; the subsequently produced study presents a true picture. The facts assembled and digested are the same facts as would have been assemble at the time of publication of the tariffs, with the exception that the facts regarding rates payable are true.

Indeed, the pertinent evidentiary reason for requiring plaintiff to have taken in ordinary course the preparatory steps it was not deterred by defendant from taking, appears to be to demonstrate intent. "Nexus" between loss and violation is permissibly shown by subsequently compiled evidence. One who fails to take steps in due course without excuse renders it irreducibly speculative whether he would in fact have entered.

In that sense, the "futility exception" simply requires compliance with the ordinary functions of courts and juries, for example, under Rule 56, F.R.C.P. Once it is shown that defendant's behavior explains plaintiff's declining to proceed, a court may not regard failure to proceed as undisputed evidence of lack of intent to enter. The issue then becomes whether plaintiff can adduce for the jury appropriate evidence of availability of

wherewithal to succeed, given the general rule that a lesser degree of proof is required where unavailability of definitive proof is the fault of defendant. Zenith Corp. v. Hazeltine, 395 U.S. 100, 123-124 (1968); Bigelow v. RKO Pictures, 327 U.S. 251, 264-65 (1945). Of course, defendant may always show that plaintiff lacked appropriate wherewithal. For example, defendants here speculate, without evidence of any kind, that plaintiff's other costs would have been excessive. Nothing prevents defendants attempting to counter plaintiff's proof on this point in due course.

Instead, the Court of Appeals requires for standing that plaintiff have produced, prior to suit, a study which, due to defendants' failure of a legal obligation to plaintiff, would have inaccurately represented that plaintiff could not succeed, and thus improperly deterred "preparations to enter". The substantive antitrust purpose of such a requirement is undisclosed. Since it produces false evidence, the requirement has no legitimate evidentiary purpose.

There are no cases in which defendant's failure of an independent obligation actually truncated serious efforts to enter business by one who could demonstrate intent and appropriate wherewithal, and in which plaintiff was found to lack standing because it did not proceed following defendants' default. This includes Gas Utilities Co. of Ala., Inc. v. Southern Natural Gas Co., 825 F.Supp. 1551, (N.D. Ala. 1992) aff'd 996 F.2d 282 (11 Cir. 1993) relied upon by the Court of Appeals. It was not claimed there that defendant failed in any independent obligation, or that plaintiff was deterred from further pertinent preparations. Nothing in any of the cases cited

by the Court of Appeals requires such a result. In all such cases plaintiff would be required to show the "injury in fact" of being kept out of business, and difficulties raised by claims of speculative damages are readily addressed as in other cases by the applicable rules of evidence.[2]

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[2] The Court of Appeals has bolstered its ruling with a number of factual findings not made by the District Court. See, Ashley Creek Phosphate Co. v. Chevron USA, Inc., 315 F.3d 1245, (10 Cir. 2003) Note 1, 1249; note 15, 1260. The apparent reason why the District Court did not make such findings, though urged by defendants, was that the underlying evidence was disputed. For example, the Court of Appeals finds that "Cominco cancelled its phosphate contract with Chevron, concluding it could obtain all the phosphate it needed at a lower cost", without disclosing that the correspondence upon which the claim is based is not specific, and subject to other interpretations, and that "Neither Chevron nor . . . SF, ever sold phosphate concentrate to a third party after 1988, despite repeatedly trying to find outside purchasers", without noting that SF made no efforts to sell, or that the potential third-party "buyers" were Chevron's competitors, making it contrary to Chevron's interest to provide them cheaper supply. N. 1, pg. 1249 The Court of Appeals details "multiple failed attempts to develop [plaintiff's] phosphate deposits", without noting that all of such "attempts" pre-dated the pipeline, which made large-scale development of both parties' properties economically feasible. N. 15, pg. 1260. It's finding here that plaintiff attempted to sell the leases to Chevron and Cominco actually contradicts its finding elsewhere that "Ashley Creek never tried to sell its leases to Chevron." Pg. 1260.

Most seriously, the Court of Appeals recites plaintiff's "deposition testimony that Ashley Creek would not move forward with its project, regardless of the amount of the tariff, without owning a forty percent (40%) share of the pipeline." Pg 1256. No such testimony exists or was cited by the District Court. (The District Court cited testimony given in 1999, long after the tariffs were found unreasonable in 1996, that plaintiff "will not" proceed without prosecuting its claim, not asserted until 1996, for appropriate divestiture.) The Court of Appeals' assertion that petitioner improperly cites the statement of undisputed facts in a

CONCLUSIONS

The Court of Appeals ruling reduces by at least half the reach of the antitrust law, while compromising real property rights whenever used in commerce. The result is not only an irrational and unnecessary limitation of standing, but endorsement of serial illegal behavior suppressing competition from development of public lands. THEREFORE, Petitioner requests that this court GRANT its Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

RESPECTFULLY SUBMITTED,

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summary judgment memorandum neglects to note that as such statement was uncontested, it was admitted, thus, the citation was appropriate.